

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Manager of Foreign Payments and International Information Reporting
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from: Branch Chief, Branch 4
Office of Associate Chief Counsel (International)
CC:INTL:B04

subject: Section 1445 Withholding on Transfers by Disregarded Entities

ISSUE

Whether a domestic entity that has elected to be treated as an entity that is disregarded from its foreign owner may certify that it is a domestic transferor for purposes of withholding under section 1445 on transfers of U.S. real property interests?

CONCLUSION

Under Treas. Reg. § 1.1445-2(b)(2)(iii), a disregarded entity may not certify that it is the transferor of a U.S. real property interest for purposes of sections 897 and 1445.

FACTS

We understand that some buyers of U.S. real property interests are not withholding 10 percent of the sales price when purchasing such real property from domestic entities that have filed a Form 8832, Entity Classification Election, to be disregarded from their foreign owners under Treas. Reg. § 301.7701-3. These transferees are obtaining certifications from domestic disregarded entity transferors of U.S. real property interests certifying that the transferring disregarded entities are domestic entities.

LAW AND ANALYSIS

Under § 897(a), gain or loss of a nonresident alien individual or foreign corporation from the disposition of a U.S. real property interest is subject to U.S. tax as if the gain or loss were effectively connected with the conduct of a U.S. trade or business. Under § 1445(a), if a foreign person disposes of a U.S. real property interest, the transferee of such interest is required to deduct and withhold a tax equal to 10 percent of the amount realized on the disposition.

Under Treas. Reg. § 1.1445-2(b)(2)(iii), a disregarded entity may not certify that it is the transferor of a U.S. real property interest. As such an entity is disregarded for U.S. tax purposes, including sections 897 and 1445, the owner of the disregarded entity is treated as the transferor of the U.S. real property interest and must provide a certificate of non-foreign status to avoid withholding under section 1445. The disregarded entity itself may not provide such a certificate.

Treas. Reg. § 1.1445-2(b)(2)(iv)(B) provides a model form for an entity to use when the entity owns a disregarded entity which transfers a U.S. real property interest. The form must include certifications that the owner of the disregarded entity is not a foreign corporation, a foreign partnership, a foreign trust or a foreign estate. Further, the owner must certify that it is not a disregarded entity as defined in Treas. Reg. § 1.1445-2(b)(2)(iii). If the owner cannot or does not certify both its non-foreign status and that it is not a disregarded entity, the transferee must withhold 10 percent of the amount realized on the disposition of the U.S. real property interest.

Please call Branch 4 of the Office of Associate Chief Counsel (International) at (202) 622-3860 if you have any questions.